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No. 07-110

FILED
OCT 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

A. J. ARAVE,

Petitioner,

v.

MAXWELL HOFFMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

A. To Establish Deficient Performance, Hoffman Was Required To Establish Wellman's Recommendation Constituted Gross Error, Without The Distorting Effects Of Hindsight

Hoffman contends Petitioner's reliance upon the requirement that he "must demonstrate gross error on the part of counsel," is misplaced because it constitutes "reliance on [a] single quotation" expressly articulated in *McMann v. Richardson*, 397 U.S. 759, 772 (1970). Brief in Opp. at 8. However, because this Court has never stated it was overruling *McMann*, or abandoning the gross error requirement, even after the advent of *Strickland v. Washington*, 466 U.S. 668 (1984), numerous jurisdictions have relied upon this requirement in determining the success of ineffective assistance of counsel claims in the context of providing advise regarding the acceptance or rejection of plea offers. The most recent circuit decision comes from *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002), which the panel ignored. Not only does *Turner* rely upon *McMann*'s gross error requirement, it also notes the Third Circuit's interpretation of the standard, "requiring a defendant to demonstrate that 'the advice . . . he received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the [plea] offer.'" *Turner*, at 880 (quoting *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992)).

Relying upon *McMann*, federal district courts have also utilized the gross error requirement. *See*,

e.g., *Wilson v. United States*, 2007 WL 2237673, *8 (D. Ariz. 2007); *Crespo v. Mendoza-Powers*, 2007 WL 549748, *11 (E.D. Cal. 2007); *Guerrero v. Fizer*, 2006 WL 3333096, *5 (D. Ariz. 2006); *Fehr v. United States*, 2006 WL 1851385, *2 n.2 (W.D. Tex. 2006); *Aragon v. Carey*, 2003 WL 21018221, *6 (N.D. Cal. 2003).

Likewise, numerous states, both prior and subsequent to *Strickland*, have relied upon *McMann*'s requirement that gross error be demonstrated. *See*, *e.g.*, *Coon v. Weber*, 644 N.W.2d 638, 643 (S.D. 2002) ("They must show not just deficient performance but gross error by counsel in recommending that they plead guilty"); *State v. Carr*, 665 So.2d 1234, 1236 (La. Ct. App. 1995) (The Court ultimately held the defendants must demonstrate gross error by counsel in recommending the plea"); *Williams v. State*, 349 N.W.2d 58, 62 (S.D. 1984) (citing *Long v. Brewer*, 667 F.2d 742 (8th Cir. 1982) ("In order to invalidate a guilty plea, appellant must show gross error on the part of counsel in recommending that he plead guilty"); *State v. Stai*, 335 N.W.2d 798, 801 (N.D. 1983) ("petitioner must demonstrate gross error on the part of his attorney in recommending that he plead guilty"); *Mitchell v. State*, 609 S.W.2d 333, 519 (Ark. 1980) ("It also seems from *McMann*, that, in order to be entitled to post-conviction relief, Mitchell must '. . . . demonstrate gross error on the part of counsel when he recommended that the defendant plead guilty instead of going to trial. . . .'"); *Scarborough v. State*, 278 So.2d 657, 658 (Fla. Dist. Ct. App. 1973) ("Appellants legal representation met the

'range of competent advice' standard of *McMann* . . . , which held that gross error on the part of counsel must be demonstrated when he recommended that the defendant plead guilty instead of going to trial"). However, in *Commonwealth v. Taylor*, 296 A.2d 823, 350 (Pa. 1972), the Pennsylvania Supreme Court determined the gross error requirement of *McMann* did not mandate a "new or higher standard," but was a "response to the particular facts involved in *McMann*."

Hoffman correctly notes this Court has not provided instruction "as to the method in which the lower courts are to interpret and employ this 'Gross Error Standard.'" Brief in Opp. at 8. However, Hoffman's observation supports the granting of certiorari, not only to instruct the lower courts, but also determine whether *McMann*'s gross error requirement continues in the context of guilty pleas after the advent of *Strickland* and *Hill v. Lockhart*, 474 U.S. 52 (1985).

B. To Establish Prejudice, Hoffman Must Allege And Prove, Based Upon A Reasonable Probability, He Would Have Accepted The State's Offer But For Wellman's Actions

Hoffman initially contends Petitioner is barred from asserting he failed to properly allege he would have pled guilty if not for Wellman's actions because the argument was allegedly raised for the first time in Petitioner's Petition for Rehearing with Suggestion

for Rehearing En Banc. Brief in Opp. at 13. This contention is simply incorrect. Expressly addressing the question of whether Hoffman had demonstrated prejudice by asserting he would have pled guilty if not for Wellman's advice, Petitioner asserted in his first brief before the Ninth Circuit:

> Further, there is no evidence that, even if Wellman had given Hoffman a different interpretation of *Adamson*, the outcome would have been different. When asked if Hoffman would have rejected the state's offer irrespective of his advice, Wellman explained:
>
> > I don't think there is any question, Mr. Anderson, that Max, in my opinion, saw his best procedure to require the State to prove those matters against him. I think he had a sense – you know, I would describe that he was of the old school. He was not, he was not going to snitch on anybody, he was not going to turn on anybody. And if the State charged him, then they needed to prove it.
> >
> > . . . .
> >
> > [H]e needed to see the evidence that the state had in order to satisfy his mind or convince him that yah, maybe there was a case here.

(S.E.R., pp.1775-76.)

Clearly, because Hoffman wanted a trial irrespective of Wellman's understanding of

> Adamson, he cannot establish prejudice because the outcome of the proceeding would not have changed based upon Wellman's advice.

Brief of Respondent-Appellee/Cross-Appellant at 46-47.

Hoffman also contends, "*Hill* does not create a *per se* rule whereby a defendant *must affirmatively state* that but for counsel's unprofessional errors, they would have acted differently." Brief in Opp. at 14 (emphasis in original). Hoffman's contention simply ignores the underlying principle from *Hill*: he must establish prejudice by proving "there is a reasonable probability that, but for counsel's errors, he would have pleaded guilty." 474 U.S. at 59. This necessarily requires that Hoffman affirmatively allege in his petition or elsewhere that, but for Wellman's recommendation, he would have pled guilty and not insisted on going to trial. *Id.* at 60. The concurring opinion in *Hill* further demonstrates there is a pleading requirement that must be met before federal habeas relief can be granted. Justice White opined, "an examination of the record reveals that petitioner alleged sufficient facts to 'show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Id.* at 62 (White, J., concurring). However, addressing the particularity with which prejudice must be pled in the habeas petition, Justice White further explained, "because petitioner failed to allege that his attorney knew about his prior

conviction but failed to inform him of the applicability of the Ark. Stat. Ann. § 43-2829B(3) (1977), I find the petitioner did not allege sufficient facts to entitle him to an evidentiary hearing on his ineffective-assistance-of-counsel claim." *Id.* at 63.

As recognized by the dissenting judges in *Hoffman*:

> If the bar for defective performance is as low as the panel sets it, a showing – that is pleading and proof – of prejudice is absolutely required lest we be forced to find ineffective assistance of counsel in every case where an attorney makes a prediction about law or judges and the prediction turns sour.

App. at 74.

While this Court has addressed numerous ineffective assistance of counsel claims since the advent of *Strickland*, none of those cases have focused upon the requirements for effective assistance of counsel in the context of advising a client to reject a plea offer made by the state. *Hill* involved only a claim of ineffective assistance associated with recommending a defendant **accept** a plea offer; the Court has never addressed the question of effective assistance associated with recommending a plea offer be **rejected**, and has not addressed the issue of effective assistance of counsel in any context of plea offers since *Hill*. This case provides the Court the opportunity to address an important questions of constitutional law that have not been touched upon in any fashion since *Hill*, particularly federal habeas pleading requirements associated

with a claim of ineffective assistance of counsel when a trial attorney recommends a client decline a plea offer submitted by the state.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be summarily reversed.

Respectfully submitted,

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